INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	11

CITATIONS

Cases:

Great Northern Ry. Co. v. *United States*, 315 U.S. 262	8
United States v. *Union Pacific R. R. Co.*, 91 U.S. 72	8

Statutes:

Internal Revenue Code of 1939, Sec. 3475 (26 U.S.C. 1952 ed., Sec. 3475)	2, 7, 8
Revenue Act of 1950, c. 994, Sec. 607(b), 64 Stat. 906, 966	8

Miscellaneous:

S. Rep. No. 2375, 81st Cong., 2d Sess., pp. 25, 135 (1950-2 Cum. Bull. 483, 502, 579)	9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 449

KELLOGG COMPANY, KELLOGG SALES COMPANY,
PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The majority and dissenting opinions in the Court of Claims (Pet. 9-18) are reported at 133 F. Supp. 387.

JURISDICTION

The judgment of the Court of Claims was entered on July 12, 1955. The petition for a writ of certiorari was filed on October 5, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1255.

QUESTION PRESENTED

Whether petitioners were required by Section 3475(a) of the Internal Revenue Code of 1939 to pay transportation taxes on shipments of property which were made entirely within the United States by carriers within the United States, but which were paid for by checks delivered to the transportation companies across the border in Canada for the sole purpose of avoiding these taxes.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> SEC. 3475 [As added by Sec. 620 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798].
>
> TRANSPORTATION OF PROPERTY.
>
> (a) *Tax.*—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect

to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * * * *

(26 U.S.C. 1952 ed., Sec. 3475.)

STATEMENT

This is a suit for refund of transportation taxes paid under Section 3475(a) of the 1939 Internal Revenue Code. The facts as found by the Court of Claims may be summarized as follows (Pet. 18-31):

During the period from July 31, 1950, to October 30, 1950, the Kellogg Company and its subsidiary, Kellogg Sales Company, petitioners here, incurred freight charges on shipments which were made either to them or by them via the New York Central and Grand Trunk Western Railroads (Pet. 18-26).

The shipments which were made to the Kellogg Company originated at some point in the continental United States and were destined for its plant at Battle Creek, Michigan, and the shipments of the Kellogg Sales Company, which originated at Battle Creek, were sent to customers situated in

some part of the continental United States (Pet. 30).

Checks in payment of the freight charges and taxes thereon were delivered to the agents of the New York Central Railroad and the Grand Trunk Western Railroad Company in Windsor, Canada, by Kathryn H. Wautelet, who was employed by the Kellogg Company on or about July 31, 1950, expressly for the purpose of transporting and delivering, on its own behalf and that of its subsidiary, such checks with letters and freight bills (Pet. 28).

The procedure for making these payments was similar in each instance, and is described in the lower court's Finding 2 as follows (Pet. 20-21, 29-30):

> a. The freight bills comprising the total charges set forth in the first item were listed in a letter addressed to The New York Central Railroad, Windsor, Ontario, by the Kellogg Company, which read in pertinent part as follows:
>
> "We contend that the 3 percent excise tax should not be imposed or collected with respect to each and every of the foregoing bills, because payment thereof is being made by the undersigned without the United States, but under the press release of July 1, 1950 (S-2389) the United States Commissioner of Internal Revenue states that such tax will apply to all shipments between two points in the United States,

and your railroad refuses to accept payment of such freight bills in Canada unless the 3 percent excise tax is paid thereon.

"It is the intention of the undersigned to file appropriate claim for refund of the 3 percent tax paid upon the amount of the above bills."

b. A cashier's check drawn by the Michigan National Bank, Battle Creek, Michigan, was obtained by Kellogg Company, payable to itself, in the amount of $3,654.98.

c. This check was indorsed at Kellogg Company's office at Battle Creek, Michigan, as follows:

Pay to the Order of The
New York Central Railroad,
Kellogg Company,
By: (S.) E. O. Orchard,
Treasurer.

d. The letter in duplicate, the freight bills listed therein, and the indorsed check were transmitted by United States mail to the Detroit, Michigan, office of Kellogg Sales Company, the wholly-owned sales subsidiary of Kellogg Company.

e. Upon arrival at the Detroit office of Kellogg Sales Company (usually the day following the mailing thereof), the duplicate letter, freight bills and indorsed check were transported by Kathryn H. Wautelet, the bearer

designated in the letter, via automobile, to Windsor, Ontario, Canada, and there delivered by her to the agent of The New York Central Railroad.

f. The agent of said railroad acknowledged receipt of the indorsed cashier's check at Windsor, Canada, in payment of the freight bills itemized in the accompanying letter, with the 3 per cent excise tax thereon, by signing a receipt at the end of the duplicate copy of the letter and returning it to the bearer.

g. The receipted duplicate copy of the letter was mailed to Kellogg Company's office at Battle Creek, Michigan, by the bearer, Kathryn H. Wautelet, or some person in the Detroit office of Kellogg Sales Company acting at her direction or request.

During the period from July 31, 1950, to October 30, 1950, the main offices of both the Kellogg Company and the Kellogg Sales Company were situated at Battle Creek, Michigan, but the Kellogg Sales Company also maintained an office at Detroit, Michigan. (Pet. 30.)

The payment of the freight charges to the railroad agents at Windsor, Canada, was not made for any purpose other than to avoid payment of the tax imposed by Section 3475(a) of the Internal Revenue Code of 1939. (Pet. 30.)

Upon the foregoing findings of fact the Court of Claims concluded that as a matter of law the

petitioners were not entitled to recover, and dismissed their petition. (Pet. 31.)

ARGUMENT

The Court of Claims correctly held that petitioners were required under Section 3475(a) of the 1939 Internal Revenue Code, *supra*, pp. 2-3, to pay transportation taxes on shipments which were (1) made entirely within the United States, by transportation companies within the United States, and (2) paid for by checks drawn on a bank within the United States. Petitioners' effort to escape the tax by delivering the checks across the border in Canada for the exclusive purpose of tax avoidance presents the first occasion on which this narrow problem has arisen. Stripped of any possible future importance by the amendment of Section 3475(a) effective November 1, 1950, the issue thus presented is plainly unworthy of certiorari.

Prior to its amendment in 1950, Section 3475(a) imposed a tax "upon the amount paid within the United States" for transportation wholly within the United States, or for that portion of the transportation within the United States where property was carried "from a point without the United States to a point within the United States * * *." As the court below observed (Pet. 13-14, 15), it is at least seriously questionable whether petitioners succeeded in escaping even the literal terms of the isolated phrase ("amount paid within the United States") they invoke when, for the single purpose of avoiding the tax, they hired a woman to deliver

over the border checks drawn on banks within the United States, payable to transportation companies within the United States, for transportation wholly within the United States. But it seems clear, wholly apart from the niceties of negotiable instruments law, that Congress intended to reach payments like these and that the effort to find a loophole in the reference to "the amount paid within the United States" was properly defeated by the court below. Section 3475(a) was enacted in 1942 as an added source of wartime revenue. Nothing in this setting [1] or in the character of the transactions Congress undertook to tax leaves room for petitioners' conclusion, as stated by the court below (Pet. 14), "that Congress intended to exempt a man who walked across the border to deliver his check and at the same time to tax his neighbor who received the same service between the same points in this country, and who paid where the service was rendered without any attempt to avoid the tax."

When Congress amended the statute in 1950, to erase even the semantic doubt on which petitioners build their case,[2] it confirmed the view adopted by the court below, noting an earlier ad-

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[1] "* * * we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress." *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 273; see also *United States* v. *Union Pacific R.R. Co.*, 91 U.S. 72, 79.

[2] Section 607(b) of the Revenue Act of 1950, c. 994, 64 Stat. 906, 966, amended Section 3475(a) of the 1939 Code to apply to any "amount paid within *or without* the United States" (emphasis added).

ministrative construction to the same effect. In its Report, the Senate Finance Committee, which had added this amendment to the proposed House bill, declared (S. Rep. No. 2375, 81st Cong., 2d Sess., p. 25 (1950-2 Cum. Bull. 483, 502)):

> (F) TRANSPORTATION OF PERSONS AND PROPERTY WHERE AMOUNTS ARE PAID OUTSIDE OF THE UNITED STATES
>
> The attention of your committee has been called to the fact that an increasing number of persons have been seeking to avoid the 15 percent tax on the transportation of persons and the 3 percent tax on the transportation of property by using various devices to pay the transportation charges outside of the United States. This practice has been increasing rapidly since the repeal of the Canadian tax on the transportation of persons in March of 1949. Many believed that payments outside the United States for transportation within the United States were tax-free because the sections levying these taxes (sec. 3469 (a) and (c) and sec. 3475 (a)) refer to "amounts paid within the United States." * * *
>
> In a release on July 7, 1950, the Commissioner stated in the case of the tax on the transportation of property—
>
> there is no doubt that Congress intended to include all domestic shipments where all the transactions in connection with shipments of

> goods normally take place within the United States.
>
> While there has been considerable dispute as to the correctness of these interpretations of the law by the Commissioner it is your committee's view that these rulings are an accurate interpretation of existing law. * * *
>
> To clarify the application of these taxes section 607 of your committee's bill adds provisions to the sections of the Internal Revenue Code imposing the taxes on transportation of persons and property (secs. 3469 and 3475) indicating that where the transportation both begins and ends in the United States, the taxes apply even though payment is made outside the United States. * * *

Again, in its detailed discussion of the specific amendments, the same Report stated (p. 135, 1950-2 Cum. Bull. 483, 579):

> Section 3475(a) of the Code now imposes a tax upon the amount paid within the United States for the transportation of property by rail, motor vehicle, water, or air from one point in the United States to another. Under the amendment the tax would be applicable to such amounts paid for the transportation of property, whether the payment is made within or without the United States.
>
> The Commissioner of Internal Revenue has issued press releases which indicate that the

> Bureau is taking a position in accordance with the intent of Congress to impose the tax on transportation within the United States in cases where attempts are made to avoid the tax by unusual methods purporting to make payment outside of the United States. It is your committee's view that the position of the Bureau properly applies existing law, and, therefore, that with respect to the situations covered by the press releases, the amendments are merely declaratory of existing law. * * *

These expressions when the statute was amended are, of course, not decisive on its meaning prior to the amendment. They do add authoritative weight to the wholly sensible construction adopted by the Court of Claims. And they highlight the critical point that petitioners' tax avoidance device, litigated so far in only this single case, has no prospective significance.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1955.

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